

## **501 KAR 1:040. Parole revocation hearing procedures.**

RELATES TO: KRS 439.315, 439.330(1)(e), 439.3406, 439.341, 439.346, 439.390, 439.430, 439.440, 532.043, 532.400

STATUTORY AUTHORITY: KRS 439.340(3)

NECESSITY, FUNCTION, AND CONFORMITY: KRS 439.340(3) requires the Parole Board to establish administrative regulations concerning parole revocation hearings. This administrative regulation contains the procedures for the revocation of parole, the probable cause hearing, and the issuance of parole violation warrants.

### **Section 1. Definitions.**

(1) "Board" means the Kentucky Parole Board established in KRS 439.320.

(2) "Fact finder" means the person or entity that determines the facts at a hearing and includes the administrative law judge or the Parole Board depending on which conducts the hearing and issues findings of fact.

(3) "Final hearing" means a hearing before a fact finder to determine by a preponderance of the evidence that a violation occurred and to offer an opportunity to present mitigating evidence.

(4) "Parole" means parole and other forms of supervision treated like parole in that the Parole Board has the authority to revoke supervision.

(5) "Probable cause hearing" means a hearing before an administrative law judge to determine if there is probable cause that a parole violation has occurred.

**Section 2. Notice of Probable Cause Hearing.** Charges of a parole violation shall be initiated by a parole officer of the Department of Corrections by service of a notice of the probable cause hearing.

(1) The parole officer shall complete the following for the notice:

(a) Alleged violations;

(b) Evidence to be presented at the hearing;

(c) Witnesses upon whose statements revocation is based if disclosure of that information will not create a risk of harm to the witness;

(d) Time;

(e) Date; and

(f) Location of hearing.

(2) The notice shall also:

(a) State the purpose of the hearing;

(b) Inform the offender of his right to:

1. Be present;

2. Speak on his own behalf; and

3. Call witnesses and present evidence in defense of the charges;

(c) Inform the offender that he may have counsel present;

(d) Inform the offender that the hearing shall not be held sooner than five (5) business days after the offender is served with the notice of the hearing, unless the offender waives this time period;

(e) Inform the offender that he may request a continuance of the hearing, if good cause is shown; and

(f) Include a copy of a blank subpoena that may be used to request documents.

### **Section 3. Probable Cause Hearing Preliminary Information.**

(1) Hearing Date. A probable cause hearing shall not be conducted earlier than five (5) business days after service of the notice of the hearing, unless this period is waived by the offender.

(2) Representation by counsel. An offender appearing at a Preliminary Revocation Hearing may be represented by counsel. The offender may have a continuance for the purpose of obtaining the presence of counsel by making a motion for this purpose. More than two (2) appearances for hearing without counsel by an offender who is capable of retaining counsel may be deemed an implicit waiver of counsel.

(3) The offender may request a continuance of the hearing from the administrative law judge for good cause.

(4) Agency representation. A duly appointed probation and parole officer of the Commonwealth of Kentucky may appear before the administrative law judge as the representative of the Department of Corrections in matters relating to the revocation of parole in the absence of an attorney, pursuant to SCR 3.700 sub-rule 3.

#### Section 4. Waiver of Probable Cause Hearing.

(1) Except for offenders who are less than eighteen (18) years of age, an offender charged with a violation of parole may waive the probable cause hearing by waiving his appearance before an administrative law judge.

(2) An offender shall submit the waiver in writing to the offender's Probation and Parole Officer who shall forward it to the board or its administrative law judge for approval.

(3) The waiver may be accepted at the discretion of the board or its administrative law judges.

(4) A waiver shall not be accepted unless it is found that the offender:

(a) Made the waiver:

1. Knowingly; and

2. Voluntarily; and

(b) Understands that the offender admits probable cause exists for the violations charged.

(5) Notwithstanding the submission and acceptance of a waiver of the probable cause hearing, the offender may still have a final revocation hearing.

(6) After approval of the waiver, the matter shall proceed in the same manner as if a hearing was held and probable cause determined.

(7) If an offender being supervised in another state signs a waiver of probable cause hearing in that state, the waiver shall be reviewed by an administrative law judge of the board to determine if the waiver meets the requirements of subsections (1) - (6) of this section. If the administrative law judge determines that the waiver does not comply with subsections (1) - (6) of this section, the board chair or designee shall refer the matter back to the Division of Probation and Parole and request that it take action necessary to insure compliance with this administrative regulation.

#### Section 5. Conduct of Probable Cause Hearing.

(1) A probable cause hearing shall be conducted by an administrative law judge who shall have control over the proceedings and the reception of evidence at the hearing.

(2) Hearing Record. A probable cause hearing shall be conducted on the record. The hearing may be recorded and preserved by any means practical, including electronically, mechanically, or stenographically. If requested by the board, the record of the proceedings shall be transcribed.

(3) Hearing Procedure.

(a) The administrative law judge may take judicial notice of acts of the board, including the

conditions of parole, and all other matters which may be judicially noticed in the courts of this Commonwealth pursuant to KRE 201. Matters for which judicial notice was taken shall be included in the administrative law judge's findings of facts.

(b) A witness shall testify under oath, administered by the administrative law judge, and shall be available for examination by the other party or the administrative law judge, unless good cause dictates otherwise. The party arguing that a witness should not be available for examination shall submit documentation to the fact finder at least twenty-four (24) hours prior to the hearing date stating the name of the witness and the basis upon which the party argues the witness should not be made available for examination by the other party.

(c) The parole officer shall bear the burden of proof in establishing the elements of the violation.

(d) The parole officer shall present evidence first and the offender shall be given the opportunity to present evidence in defense. Any further proceedings shall be conducted at the discretion of the administrative law judge.

(4) Amend Notice of Hearing. The notice of the hearing may be amended at any time prior to the close of the record of the preliminary hearing, within the discretion of the administrative law judge, if a finding is made that the substantial rights of the parolee shall not be prejudiced by the amendment. If the notice is amended, a continuance of the hearing may be granted if the interest of justice so requires. Failure to object to any defect in the notice prior to the close of the hearing shall be deemed a waiver.

(5) Continuance of Hearing. The probable cause hearing may be continued or recessed with further proof to be taken at any time prior to the close of the record for good cause shown. At the request of either party, the administrative law judge may, within his or her discretion, leave the record open for reception of additional evidence provided that no substantial rights are prejudiced. The record shall not be left open for longer than fourteen (14) business days unless good cause is shown and approved by the administrative law judge.

#### Section 6. Probable Cause Determination.

(1) The administrative law judge shall make a determination whether probable cause exists to believe that the offender has committed any or all of the violations alleged in the notice of probable cause hearing.

(2) The determination shall be made from the evidence produced at the hearing and any evidence for which judicial notice is taken.

(3) The determination shall be rendered at the close of the hearing or within a reasonable time thereafter.

(4) If probable cause is not found by the administrative law judge:

(a) The offender shall continue on parole without further action by the board, if no parole violation warrant has been issued; or

(b) The matter shall be referred to the board pursuant to Section 7 of this administrative regulation for the warrant to be rescinded, if a parole violation warrant has been issued.

(5) If probable cause is found by the administrative law judge, the matter shall be referred to the board for issuance of a parole violation warrant, if one has not been issued, and a final revocation hearing.

(6) The administrative law judge shall not consider matters of bail or any other form of release from custody for an offender accused of parole or probation violations, in the absence of any specific statutory authorization.

(7) Written Decision. The administrative law judge shall issue within seven (7) business days a written decision stating the determination concerning probable cause, the reasons for the determination, and the evidence relied upon. The decision shall be sent to the parole of-

ficer and the offender or counsel if represented at the probable cause hearing.

#### Section 7. Referral for Parole Violation Warrant.

(1) If probable cause is determined to exist, the case shall be referred to the board for issuance of a parole violation warrant and a final revocation hearing.

##### (2) New Criminal Conviction.

(a) If the alleged violation of parole, as set forth in the notice of probable cause hearing, is new criminal conduct which does not also constitute a technical violation of the conditions of supervision, or the conditions of parole, the case shall not be referred to the board for parole revocation consideration unless the:

1. Offender has received a conviction in a court of law;
2. Offender had pled guilty to the alleged criminal conduct;
3. Offender has made some other form of judicial admission; or
4. Criminal conduct, or a substantial part of it, was committed in the presence of a duly appointed probation and parole officer of the Commonwealth of Kentucky.

(b) Nothing in this subsection shall prevent revocation of parole for a technical violation, which also happens to partially or wholly involve criminal conduct.

Section 8. Parole Violation Warrant. Parole violation warrants shall be issued as set forth below:

(1) If a case is referred to the board by the administrative law judge under the provisions of Section 6(5) of this administrative regulation, the board chair shall issue the parole violation warrant. A vote of the board shall not be necessary.

(2) If it appears that an offender has absconded from parole supervision, it otherwise appears that a parolee is a fugitive from justice, or a parole violation warrant is necessary to effect the return of the parolee to the state of Kentucky, the board chair may issue a warrant, if the chair receives documentation from the supervising parole officer, setting forth facts sufficient to conclude there are reasonable grounds to believe that some violation has occurred, and the commissioner or his designee submits to the board a recommendation that a warrant be issued.

(3) If the offender is being supervised outside the state of Kentucky, the board chair shall determine whether to issue a parole violation warrant based upon:

(a) A written report from the supervising state setting forth facts sufficient to conclude that there are reasonable grounds to believe that a violation of parole has occurred; and

(b) The commissioner or his designee submits to the board a recommendation that a warrant be issued.

(4) The board may decline any request for a parole violation warrant made pursuant to any section of this administrative regulation except subsection (1) of this section. Any parole violation warrant, issued under any section of this administrative regulation, may be rescinded by majority vote of the board at any time.

(5) The board chair shall issue parole violation warrants for the board without a board vote.

(6) Any member of the board designated by the board chair may sign a parole violation warrant in the absence of the chair.

Section 9. Probable Cause Hearing Conducted Subsequent to Issuance of the Parole Violation Warrant or for Offenders Supervised in Another State.

(1) (a) This subsection shall not apply if a parolee is being supervised by another state and if that supervisory state held a probable cause hearing for the parolee.

(b) A probable cause hearing shall be conducted, if:

1. A parole violation warrant was issued for an offender without a probable cause hearing; and

2. The offender is apprehended or returns to the Commonwealth of Kentucky.

(c) Except as provided by paragraph (e) of this subsection, following the hearing, the offender shall be ordered returned to the appropriate institution of the Kentucky Department of Corrections for further consideration by the board if the administrative law judge finds that there is probable cause to believe that the:

1. Offender committed any of the violations contained in the warrant; and

2. Warrant was validly issued as to any of the charges contained within it.

(d) If the administrative law judge finds no probable cause, the case shall be referred to the board to withdraw the warrant and return the offender to supervision.

(e) If probable cause is found:

1. The administrative law judge shall refer the case to the board to decide whether the warrant should be exercised or withdrawn if:

a. The parole officer moves for a referral; or

b. The administrative law judge finds that there are overwhelming mitigation factors present that were not known to the board at the time of the warrant's issuance.

2. If the board decides to withdraw the warrant, the offender shall be returned to normal parole supervision, subject to any additional conditions the board may impose.

3. If the board decides to exercise the warrant, the parolee shall be ordered returned to the appropriate institution.

(2) If a probable cause hearing is held by the supervising state for an offender being supervised in another state, and the supervising state concludes as a result of the hearing that a violation has occurred:

(a) The case shall first be reviewed by an administrative law judge for the board to determine whether the proceeding held in the supervising state and the conclusions reached in the hearing comply with due process;

(b) After the review, the administrative law judge shall refer the case to the board for:

1. Issuance of a parole violation warrant as set forth in Section 7 of this administrative regulation if one has not been issued; or

2. A final hearing as set forth in Section 11 of this administrative regulation if a warrant has been issued.

Section 10. Notice of Final Revocation Hearing. The final revocation hearing process shall be initiated by service of a notice of final revocation hearing.

(1) The parole officer shall complete the following for the notice:

(a) Alleged violations;

(b) Evidence against the offender to be presented at the hearing;

(c) Witnesses upon whose statements revocation is based if disclosure of that information will not create a risk of harm to the witness;

(d) Time;

(e) Date;

(f) Location of hearing; and

(g) The notice shall include a copy of a blank subpoena that can be used to request documents.

(2) The notice shall also inform the offender that:

(a) A hearing will be conducted on the alleged violations;

(b) The standard of proof for the hearing shall be a preponderance of the evidence;

(c) The offender may call witnesses and present evidence in defense and mitigation of the

charges;

(d) The offender may be entitled to have counsel present at the final revocation hearing; and

(e) If the offender wants to have counsel present at the final revocation hearing, he shall request the presence of counsel at the hearing in writing prior to the hearing date. The fact finder shall respond to his request within five (5) business days of receipt.

#### Section 11. Final Revocation Hearing Preliminary Information.

(1) Hearing Date. A final revocation hearing shall be held within thirty (30) days after the return of the parolee to a state institution. The offender may request a delay or continuance for good cause from the board.

(2) The purpose of the final revocation hearing shall be to determine if the offender's parole will be revoked.

(3) Requests to have counsel present at the final revocation hearing.

(a) A determination of whether the offender may have counsel present at the final revocation hearing shall be made on a case-by-case basis by the board within five (5) days after the request is received by the fact finder.

(b) In making this determination, the board shall consider whether the offender:

1. Has articulated a timely and colorable claim that he did not commit the alleged violation of the conditions of supervision;

2. Has articulated substantial reasons that:

a. Justify or mitigate the violation;

b. Make the revocation inappropriate; and

c. Are complex or otherwise difficult to develop or present; and

3. Appears to be capable of speaking effectively for himself.

(c) If the offender is allowed counsel at the final hearing, the offender may have a continuance for the purpose of obtaining the presence of counsel by making a motion for this purpose. More than two (2) appearances for hearing without counsel by an offender who is capable of retaining counsel may be deemed an implicit waiver of counsel.

(4) Limited Request for Final Revocation Hearing.

(a) If an offender had a final revocation hearing on or after July 5, 2018 and before October 24, 2019, the offender may request a new final revocation hearing by sending a request for a new final revocation hearing in writing to the board. The request shall include:

1. The date of the offender's probable cause hearing;

2. The date of the revocation decision; and

3. Any documentation of the revocation decision in the offender's possession.

(b) A request for a final hearing under this section shall not be accepted if a final revocation hearing was held on or after October 24, 2019.

#### Section 12. Waiver of Final Revocation Hearing.

(1) With the exception of offenders who are less than eighteen (18) years of age, an offender being held pursuant to a parole violation warrant may request to waive his final revocation hearing, after his probable cause hearing or acceptance of a waiver of the final revocation hearing.

(2) Waiver Procedure.

(a) An offender shall submit the waiver in writing to the board or its fact finder for approval.

(b) The waiver may be accepted at the discretion of the board or its fact finder.

(c) A waiver shall not be accepted unless it is found that the offender:

1. Made the waiver:

a. Knowingly; and

b. Voluntarily; and

2. Understands that the offender admits the violations charged occurred.

(d) In the event that waiver of the final revocation hearing is accepted, the final decision on the revocation of the offender's parole shall be made by the board without any further proceedings.

### Section 13. Conduct of Final Revocation Hearing.

#### (1) Hearing Procedure.

(a) The charges of violations and the evidence against the offender shall be explained to offender.

(b) The offender shall then have the opportunity to present evidence in defense and mitigation of the charges.

(c) The standard of proof shall be a preponderance of the evidence.

(d) The hearing may be continued or recessed with further proof to be taken at any time prior to the close of the record for good cause shown and provided no substantial rights are prejudiced.

(e) The hearing shall be conducted on the record and may be recorded and preserved by any means practical, including electronically, mechanically, or stenographically. If requested by the Board, the record of the proceedings shall be transcribed.

#### (2) Written Findings of Fact and Decision.

(a) The fact finder shall provide the offender with written findings of fact concerning the alleged violations within twenty-one (21) days of the final revocation hearing.

(b) The board chair or designee may extend the time period for good cause. Notice of an extension shall be sent to the offender.

(c) The fact finder shall include a:

1. Determination of whether the fact finder found the offender to have committed the alleged violations by a preponderance of the evidence; and

2. List of:

a. Mitigating evidence presented at the hearing; and

b. Any findings of fact made concerning mitigating evidence presented at the hearing.

(d) The board shall issue a decision in writing to determine whether parole is revoked or not:

1. Based on the findings of fact determined at the final revocation hearing; or

2. Based on its own review of the facts and reasoning; and

3. The Board's decision shall include an analysis of whether the offender's violation constitutes a significant risk to the offender's victim or the community at large and whether the offender can be appropriately managed in the community.

(e) A copy of the decision shall be provided to the offender.

The Chair of the Kentucky Parole Board, with the authorization and approval of a majority of the members of the Kentucky Parole Board on March 10, 2020, approves the promulgation of the regulation on behalf of the Kentucky Parole Board, as indicated by her signature below. (15 Ky.R. 1190; eff. 12-2-198; 19 Ky.R. 2295; 20 Ky.R. 72; eff. 7-12-1993; 21 Ky.R. 2169; 2674; eff. 5-4-1995; 27 Ky.R. 3351; 28 Ky.R. 618; eff. 9-10-2001 46 Ky.R. 1943, 2663; eff. 8-4-2020)